

Rick Frey v. Kerry Kouf
484 N.W.2d 864 (S.D. 1992)

WUEST, Justice

Plaintiff Frey (Frey) brought a cause of action against Defendant Kouf (Kouf) on the alternate theories of “intentional assault” (battery) and “Negligent assault” (negligence). The matter was tried before a jury. The jury found in favor of Kouf and the trial court entered a judgment dismissing the Plaintiff’s complaint. Frey appeals to this court raising the following issue[].

I. Whether the trial court erred in instructing the jury on the definition of “intent” within the context of civil proceedings.

Frey and Kouf were friends and business associates. They bought and sold cars together and jointly owned property, including boats and an airplane. On March 12, 1990, Frey and Kouf met at a bar in Rapid City, South Dakota. Both men arrived at the bar sometime between 4:00 p.m. and 5:00 p.m.. Both men consumed alcoholic beverages. The bartender testified [that] both men drank steadily throughout the evening. A cocktail waitress testified [that] they were intoxicated. Both men discussed a mutual business arrangement. The conversation became rather heated at times. Both men used profanity. The evidence concerning what happened next was highly conflicting.

Dawn Anderson (Anderson), a waitress at the bar, testified as follows. Shortly after she completed her shift, she was seated at the bar having an “after work drink.” While she was having her drink, she heard the discussion at the table where Frey and Kouf were seated get louder. She then observed Kouf stand up very quickly, his chair sliding into the wall, and proceed around the table with a glass in his hand. Kouf then hit Frey in the face with the glass. Anderson denied that Kouf threw the glass. She also denied having seen Kouf throw the glass on the table causing it to ricochet into Frey’s face. After Kouf hit Frey in the face with the glass, Anderson saw Frey fall out of the chair. At this point, she testified [that] Kouf was “right on top of him and was kicking the back of him.” Anderson saw Kouf kick Frey in the back two or three times. Anderson testified [that] the incident happened very quickly and that, prior to the occurrence, there was no indication it was about to happen. At no time did Anderson hear Frey threaten Kouf nor did she see Frey fight back.

Two other witnesses testified that, although they did not see the actual injury take place, Frey did not physically provoke Kouf. They also stated [that] the incident occurred without warning. Kouf himself testified [that] Frey did not threaten him with physical harm.

Kouf testified [that] the time of the incident was “one of the angriest moments” of his life, that throwing the glass was his way of “venting his frustrations,” and that he saw his “life unraveling” moments before the incident occurred. Kouf testified [that] he was losing his business, his marriage was on the rocks, he was probably going bankrupt, and he vented these frustrations by picking up the bar glass and throwing it “in [Frey’s] direction.” Kouf denied “smashing” the glass into Frey’s face. Kouf’s attorney asked Kouf, “[W]hen the glass left your hand, did you

intend to strike him in the face?” Kouf answered, “I didn’t intend to *hurt* Rick Frey; that was not my intention.” (Emphasis added.) Later, Kouf stated [that] he did not intend to *hit* Frey with the glass. (Emphasis added.) He also testified, “I picked the glass up and I threw it as quick as I could.” Kouf then testified that, when he threw the glass, he was looking down, and “wanted it to catch his attention that I was angry.” Kouf admitted [that] he got carried away and was not justified in hurting Frey.

We now turn to the merits of Frey’s argument. Initially, the court instructed the jury [that] battery is defined as “any willful and unlawful use of force or violence upon the person of another” and assault and battery is “an unlawful touching of the person of another. . . .” The trial court then instructed the jury that willfully “means intentionally.” Then, . . . , the trial court, using the criminal pattern jury instructions, defined the word “intentionally” as follows:

The word ‘intentionally’ or any derivatives thereof as used in these instructions means a *specific design to cause a certain result*. (Emphasis added.)

This court has held:

[I]ntentional tortious conduct is when an ordinary, reasonable, prudent person would believe an injury was *substantially certain* to result from his conduct. . . . To establish intentional conduct, more than the knowledge and appreciation of risk is necessary; the known danger must cease to become only a foreseeable risk which an ordinary, reasonable, prudent person would avoid (ordinary negligence), and become a *substantial certainty*. (Emphasis added.)

In a battery cause of action, it is not necessary to prove the actor had a “specific design” to cause bodily contact. “The intent with which tort liability is concerned is not necessarily a hostile intent, or a desire to do any harm. Rather it is an intent to bring about a result which will invade the interests of another in a way that the law forbids.” Here that result is an application of force upon the plaintiff’s person. Intent “extends not only to those consequences which are desired, but also to those which the actor believes are substantially certain to follow from what the actor does.” By way of example, an actor who fires a bullet into a crowded room may desire that no one be hit, but if he knows it is substantially certain someone will be hit, the actor intends that consequence.

Intent is an essential element in an action for assault and battery. Thus, the definition of intent was crucial in determining Kouf’s liability for battery. The jury was instructed that, to find Kouf liable, it must find [that] Kouf had a specific design to cause the injury to Frey. That was an incorrect statement of the law. Instead, the jury should have been instructed that, to find Kouf liable, it need only find that Kouf acted with substantial certainty that bodily contact with Frey would occur – that Frey would be struck with the glass.

Here, Kouf testified he was only six feet away from Frey. He admitted the moment was one of the “angriest moments” in his life and that he hurled the glass in Frey’s direction while looking down. However, Kouf testified that he did not desire to harm Frey, but merely wished to “get his

attention.” Moreover, Frey also testified [that] he did not think Kouf would “intentionally” harm him. Indeed, the defense concentrated on proving [that] Kouf was not a malicious person and did not mean to hurt Frey. The jury found for Kouf on the intentional tort theory. It is apparent [that] the jury’s focus was improperly deflected from the true intent requirement; that is, whether a reasonably prudent person would have been substantially certain that bodily contact would result from Kouf’s conduct.

Because the trial court gave an erroneous jury instruction . . . we reverse and remand for a new trial.

MILLER, C.J., and HENDERSON, SABERS and AMUNDSON, JJ., concur.

Robert Brzoska and Mary Ann Brzoska, his wife, et al.
v.
Edward P. Olson, Administrator of the Estate of Raymond P. Owens
668 A.2d 1355 (Del. 1995)

WALSH, Justice, for the majority:

In this appeal from the Superior Court, we confront the question of whether a patient may recover damages for treatment by a health care provider afflicted with Acquired Immunodeficiency Syndrome (“AIDS”) absent a showing of a resultant physical injury or exposure to the disease. The appellants, plaintiffs below, are 38 former patients of Dr. Raymond P. Owens, a Wilmington dentist who died of AIDS on March 1, 1991. In an action brought against Edward P. Olson, the administrator of Dr. Owens’ estate, the plaintiffs sought recovery under theories of negligence, battery, and misrepresentation. After limited discovery, the Superior Court granted summary judgment in favor of Dr. Owens’ estate, ruling that in the absence of a showing of physical harm, plaintiffs were not entitled to recover under any theory advanced. Plaintiffs have appealed . . . the ruling[] disallowing recovery on the claim[] of battery. . . .

We conclude that the Superior Court correctly ruled that, under the circumstances of Dr. Owens’ treatment, there can be no recovery for fear of contracting a disease in the absence of a showing that any of the plaintiffs had suffered physical harm. Specifically, plaintiffs cannot recover under battery *as a matter of law* because they could not show that their alleged offense was reasonable in the absence of being actually exposed to a disease-causing agent.

I.

Prior to his death, Dr. Owens had been engaged in the general practice of dentistry in the Wilmington area for almost 30 years. Although the plaintiffs have alleged that Dr. Owens was aware that he had AIDS for the last ten years, it is clear from the record that it was in March, 1989 that Dr. Owens was advised by his physician that he was HIV-positive. Dr. Owens continued to practice, but his condition had deteriorated by the summer of 1990. Toward the end of 1990, he exhibited open lesions, weakness, and memory loss. In February, 1991, his physician recommended that Dr. Owens discontinue his practice because of deteriorating health. Shortly thereafter, on February 23, Dr. Owens was hospitalized. He remained hospitalized until his death on March 1, 1991.

Shortly after Dr. Owens’ death, the Delaware Division of Public Health (the “Division”) undertook an evaluation of Dr. Owens’ practice and records, in part to determine if his patients had been placed at risk through exposure to HIV. The Division determined that Dr. Owens’ equipment, sterilization procedures and precautionary methods were better than average and that he had ceased doing surgery since being diagnosed as HIV-positive in 1989. Although the Division determined that the risk of patient exposure was “very small,” it notified all patients treated by Dr. Owens from the time of his 1989 diagnosis until his death that their dentist had died from AIDS and that there was a possibility that they were exposed to HIV. The Division

also advised the former patients that they could participate in a free program of HIV testing and counseling. Some patients availed themselves of the Division's testing while others secured independent testing. Of the 630 former patients of Dr. Owens who have been tested, none have tested positive for HIV.

In their Superior Court action, the plaintiffs alleged that each of them had been patients of Dr. Owens in 1990 or 1991. Each claimed to have received treatment, including teeth extraction, reconstruction and cleaning, during which their gums bled. The plaintiffs alleged that Dr. Owens was HIV-positive and that he exhibited open lesions and memory loss at the time of such treatment. The plaintiffs did not allege the contraction of any physical ailment or injury as a result of their treatment, but claimed to have suffered "mental anguish" from past and future fear of contracting AIDS. They also alleged embarrassment in going for medical testing to a State clinic which they found to be "an uncomfortable environment." Plaintiffs sought compensation and punitive damages for mental anguish, the cost of medical testing and monitoring, and reimbursement for monies paid to Dr. Owens for dental treatment.

Plaintiffs' theory of recovery was cast in . . . battery [T]he battery count sought recovery for . . . "offensive" touching."

After brief discovery, the Owens defendants ("Owens") moved for summary judgment on [the ground] that all plaintiffs . . . did not state a claim for damages in the absence of a showing of physical injury. [T]he Superior Court ruled that plaintiffs had no basis for recovery for "fear of AIDS" in the absence of an underlying physical injury. Accordingly, the court dismissed . . . the complaint. Plaintiffs have appealed

B.

Under the Restatement (Second) of Torts, "[a]n actor is subject to liability to another for battery if (a) he acts intending to cause a harmful or offensive contact with the person . . . and (b) a harmful contact with the person of the other directly or indirectly results. This Court has recognized that, under appropriate factual circumstances, a patient may have a cause of action against a medical practitioner for the tort of battery for acts arising from the practitioner's professional conduct.

In essence, the tort of battery is the intentional, unpermitted contact upon the person of another which is harmful or offensive. Lack of consent is thus an essential element of battery. The intent necessary for battery is the intent to make contact with the person, not the intent to cause harm. In addition, the contact need not be harmful, it is sufficient if the contact offends the person's integrity. The fact that a person does not discover the offensive nature of the contact until after the event does not, *ipso facto*, preclude recovery.

Although a battery may consist of any unauthorized touching of the person which causes offense or alarm, the test for whether a contact is "offensive" is not wholly subjective. The law does not permit recovery for the extremely sensitive who become offended at the slightest contact. Rather, for a bodily contact to be offensive, it must offend a *reasonable* sense of personal

dignity. In order for a contact to be offensive to a reasonable sense of personal dignity, it must be one which would offend the ordinary person and as such one not unduly sensitive as to his personal dignity. It must, therefore, be a contact which is unwarranted by the social usages prevalent at the time and place at which it is inflicted. The propriety of the contact is therefore assessed by an objective “reasonableness” standard.

Plaintiffs contend that the “touching” implicit in the dental procedures performed by Dr. Owens was offensive because he was HIV-positive. We must therefore determine whether the performance of dental procedures by an HIV-infected dentist, standing alone, may constitute offensive bodily contact for purposes of battery, i.e., would such touching offend a *reasonable* sense of personal dignity.

The risk of HIV transmission from a health care worker to a patient during an invasive medical procedure is very remote.¹ In fact, even a person who is *exposed* to HIV holds a slim chance of infection. The CDC has estimated that the theoretical risk of HIV transmission from an HIV-infected health care worker to a patient following actual percutaneous exposure to HIV-infected blood is, by any measure, less than one percent.

As earlier noted, the offensive character of a contact in a battery case is assessed by a reasonableness standard. In a “fear of AIDS” case in which battery is alleged, therefore, we examine the overall reasonableness of the plaintiffs’ fear in contracting the disease to determine whether the contact or touching was offensive. Since HIV causes AIDS, any assessment of the fear of contracting AIDS must, *ipso facto*, relate to the exposure to HIV. Moreover, because HIV is transmitted only through fluid-to-fluid contact or exposure, the reasonableness of a patient’s fear of AIDS should be measured by whether or not there was a channel of infection or actual exposure of the plaintiff to the virus.

It is unreasonable for a person to fear infection when that person has not been exposed to a disease. In the case of AIDS, actual exposure to HIV may escalate the threat of infection from a theoretical, remote risk to a real and grave possibility if the person exposed is motivated by speculation unrelated to the objective setting. Such fear is based on uninformed apprehension, not reality. In such circumstances, the fear of contracting AIDS is *per se* unreasonable, without proof of actual exposure to HIV. In our view, the mere fear of contracting AIDS, in the absence of actual exposure to HIV, is not sufficient to impose liability on a health care provider. AIDS phobia, standing alone, cannot form the basis for recovery of damages, even under a battery theory because the underlying causation/harm nexus is not medically supportable.

¹The CDC estimates that the probability of HIV transmission from a dentist to patient during a dental procedure in which the patient bleeds ranges from one in 263,158 and one in 2,631,579. The only known instance of HIV transmission from a health care worker to a patient occurred in the well-publicized Kimberly Bergalis case in which a Florida dentist infected as many as five of his patients. To date, medical experts have been scientifically unable to determine how the dentist infected his patients.

AIDS is a disease that spawns widespread public misperception based upon the dearth of knowledge concerning HIV transmission. Indeed, plaintiffs rely upon the degree of public misconception about AIDS to support their claim that their fear was reasonable. To accept this argument is to contribute to the phobia. Were we to recognize a claim for the fear of contracting AIDS based upon a mere allegation that one *may* have been exposed to HIV, totally unsupported by any medical evidence or factual proof, we would open a Pandora's Box of "AIDS-phobia" claims by individuals whose ignorance, unreasonable suspicion or general paranoia cause them apprehension over the slightest of contact with HIV-infected individuals or objects. Such plaintiffs would recover for their fear of AIDS, no matter how irrational. We believe the better approach is to assess the reasonableness of a plaintiff's fear of AIDS according to the plaintiff's *actual* – not *potential* – exposure to HIV.

In sum, we find that, without actual exposure to HIV, the risk of its transmission is so minute that any fear of contracting AIDS is *per se* unreasonable. We therefore hold, *as a matter of law*, that the incidental touching of a patient by an HIV-infected dentist while performing ordinary, consented-to dental procedures is insufficient to sustain a battery claim in the absence of a channel for HIV infection. In other words, such contact is "offensive" only if it results in actual exposure to the HIV virus. We therefore adopt an "actual exposure" test, which requires the plaintiff to show "actual exposure" to a disease-causing agent as a prerequisite to prevail on a claim based upon fear of contracting disease. Attenuated and speculative allegations of exposure to HIV do not give rise to a legally cognizable claim. . . .

In this action, plaintiffs have never alleged, either individually or collectively, *actual exposure* to HIV.

The judgment of the Superior Court is AFFIRMED. . . .